Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	WC Docket No. 07-245
Policies Governing Pole Attachments	)	

REPLY COMMENTS OF AT&T INC.

Gary L. Phillips
Paul K. Mancini
AT&T INC.
1120 20th Street, NW, 10th Floor
Washington, D.C. 20036

Dorian S. Denburg
AT&T INC.
675 West Peachtree Street NW
Suite 4300
Atlanta, GA 30375

Bennett L. Ross
David C. Rybicki
WILEY REIN LLP
1776 K Street N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for AT&T Inc.

April 22, 2008

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	WC Docket No. 07-245
Policies Governing Pole Attachments	)	

REPLY COMMENTS OF AT&T INC.

I. INTRODUCTION AND SUMMARY

Consistent with numerous comments filed by parties in this proceeding, including AT&T Inc. ("AT&T"), the Commission should adopt its tentative conclusion and establish a uniform rate for pole attachments used to provide broadband Internet access service. Commenters generally agree that: (1) the establishment of a uniform rate would advance the broader goals of the Communications Act of 1934 ("Act"), including promoting broadband deployment and ensuring competitive neutrality; and (2) the Commission has the statutory authority to adopt a uniform rate for pole attachments used to provide broadband service.

However, taking a page from George Orwell's *Animal Farm* where "all animals are equal, but some animals are more equal than others," some commenters urge the Commission to establish a "uniform" broadband rate that would apply to all broadband providers, *except* incumbent local exchange carriers ("ILECs"). A single pole attachment rate applicable to only some broadband providers but not others would be neither "uniform" nor reasonable. Rather, such an approach would only advance the narrow interests of electric companies ("ELCOs"), which seek to continue using pole attachment revenues as a line of business, and cable operators and competing local exchange carriers ("CLECs"), which seek to perpetuate the current pole

attachment regime which distorts competition for broadband services by putting ILECs at an artificial competitive disadvantage. The Commission should see through such self-serving ploys.

The Commission also should see through the erroneous arguments of some commenters that ILECs are not entitled to just and reasonable pole attachment rates under section 224. These arguments blatantly ignore the plain language of 47 U.S.C. § 224, erroneously conflate different provisions of the statute, and intentionally disregard well-established canons of statutory construction. Moreover, the Commission has ancillary jurisdiction to effectuate section 706 by extending to ILECs the protections of just and reasonable rates for attachments used to provide broadband service. Accordingly, the Commission should find that any pole attachment rate to which an ILEC is subject that exceeds just and reasonable levels is unlawful and should direct that existing joint use agreements containing unlawful pole attachment rates be modified accordingly.

The Commission should reject ELCO proposals to adjust the Commission's current pole attachment formulas. These proposals represent nothing more than a transparent attempt by ELCOs to impose unreasonable rate increases on attachers, and they are premised upon flawed and self-serving assumptions. While the Commission should unify rates for pole attachments used to provide broadband Internet access service, the Commission would hardly promote broadband deployment by implementing the unwarranted pole attachment rate increases sought by the ELCOs.

Although AT&T is a pole owner and shares concerns about unauthorized pole attachments, AT&T does not agree with the ELCOs' proposed measures to address this issue. Such measures, which include multiple levels of self-effectuating fines and penalties, are overreaching, self-serving, and represent yet another revenue opportunity for the ELCOs.

Finally, the Commission should refrain from micro-managing the processes by which attachers access utility poles as proposed by Fibertech Networks, LLC ("Fibertech"). Fibertech's proposals are a solution in search of a problem and, despite being given ample opportunity to present concrete facts that ostensibly would justify the adoption of Fibertech's "best practices" proposal, neither Fibertech nor any other party has produced such evidence. Furthermore, the proposed rules endorsed by Fibertech and its supporters contravene section 224(f)(1) by essentially requiring superior access to poles, ducts, and conduit – rather than ensuring "nondiscriminatory access" – and by effectively precluding a pole owner from taking into account "safety, reliability, and generally applicable engineering purposes" in addressing access issues. Because of the complexity of the technical and operational issues associated with access to poles, ducts, and conduit, any problems should be addressed in the first instance through bilateral negotiations, rather than the prescriptive rules proposed by Fibertech.

II. DISCUSSION

A. The Commission Should Establish A Uniform Broadband Pole Attachment Rate.

1. The overwhelming majority of commenters endorse the Commission's tentative conclusion to establish a uniform broadband rate.

The Commission's tentative conclusion to adopt a uniform rate for pole attachments used for broadband Internet access service enjoys wide support. Commenters endorsing this tentative conclusion include ELCOs,[1] ILECs,[2] CLECs,[3] cable operators,[4] trade associations,[5] wireless

[1] Comments of Alabama Power, Georgia Power Company, Gulf Power Company and Mississippi Power Company at 14-15 ("Alabama Power Comments"); Comments of Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, and NSTAR at 37 ("Allegheny Power Comments"); Comments of Ameren Services Company and Virginia Electric and Power Company d/b/a Dominion Virginia Power at

providers,[6] and public interest groups.[7] As one commenter correctly noted, "the current regulatory regime governing pole attachment rates is broken" whereby ILECs, CLECs, and cable operators offering competing broadband services "pay widely varying rates for pole attachments

---

18 ("Ameren Comments"); Comments of Florida Power & Light and Tampa Electric Company at 11-12 ("Florida Power Comments"); Comments of Idaho Power Company at 3 ("Idaho Power Comments"); Comments of PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation at 9-11 ("PacificCorp Comments").

[2] Comments of AT&T Inc. at 10-21 ("AT&T Comments"); Comments of CenturyTel, Inc. at 12-14 ("CenturyTel Comments"); Comments of Frontier Communications at 4-5; Comments of Qwest Communications International Inc. at 1, 4-6; Comments of Verizon Telephone Companies at 3-6 ("Verizon Comments"); Comments of Windstream Corporation at 2, 3-5.

[3] Comments of Alpheus Communications, L.P. and 360networks (USA), Inc. at 2, 5 ("Alpheus Comments"); Comments of Knology, Inc. at 2, 3-6 ("Knology Comments"); Comments of Time Warner Telecom Inc., One Communications Corp. and COMPTEL at 3-4 ("COMPTEL Comments").

[4] Comments of Time Warner Cable Inc. at 11 ("Time Warner Cable Comments").

[5] Comments of Alabama Cable Telecommunications Association, the Broadband Cable Association of Pennsylvania, the Broadband Communications Association of Washington, the Cable Television of Georgia, the Cable Telecommunications Association of New York, Inc., the Cable Telecommunications Association of Maryland, Delaware & District of Columbia, the Missouri Cable Telecommunications Association, the New England Cable and Telecommunications Association, Inc. at 20-21 ("State Cable Association Comments")); Comments of CTIA – The Wireless Association® at 14 ("CTIA Comments"); Comments of Edison Electric Institute & Utilities Telecom Council at 95-97 ("EEI Comments"); Comments of Independent Telephone & Telecommunications Association at 8; Comments of United States Telecom Association at 10-12 ("USTelecom Comments"); Comments of Utilities Telecom Council at 12-14 ("UTC Comments").

[6] Comments of DAS Forum and PCIA – The Wireless Infrastructure Association at 14; Comments of MetroPCS Communications, Inc. at 3-4 ("MetroPCS Comments"); Comments of T-Mobile USA, Inc. at 6.

[7] Comments of Discovery Institute at 1-2; Reply Comments of the Telecommunications & Information Technology Task Force, American Legislative Exchange Council at 2-3.

used to provide these services."[8] Commenters generally agree that a uniform broadband rate would promote broadband deployment consistent with section 706 and advance broadband competition by discouraging discrimination between different broadband platforms.[9]

AT&T agrees with the majority of commenters that the Commission has ample authority to adopt a uniform rate for pole attachments used to provide broadband Internet access service.[10] As AT&T pointed out in its initial comments, the Supreme Court has construed broadly the Commission's authority under section 224, which includes not only the authority to establish the statutorily prescribed rate formulas applicable to the pole attachments of cable operators, 47 U.S.C. § 224(d)(3), and non-incumbent telecommunications carriers, 47 U.S.C. § 224(e)(1), but also the authority to regulate pole attachment rates as the Commission deems appropriate to promote deployment of other services such as broadband Internet access.[11]

Only one commenter – MI-Connection – argues that the Commission lacks the authority to adopt a uniform rate for pole attachments used for broadband Internet access service.[12]

---

[8] Verizon Comments at 3-4.

[9] *See, e.g.,* Alpheus Comments at 5 (noting that "[t]he character of the attachments do not notably differ between platforms used to provide similar services" and that "a single rate promotes competition by discouraging discrimination between different platforms ..."); Alleghany Power Comments at 35-36 ("A single, unified pole attachment rate should be applied to all attachers offering broadband services rate for the provision of broadband services," noting that "[f]airness requires no less"); CenturyTel Comments at 2-3; EEI Comments at 13 (asserting that "to ensure a level playing field for competitors, all jurisdictional attaching entities should pay the same, non-subsidized rate"); MetroPCS Comments at 3-6; USTelecom Comments at 4-9.

[10] *See, e.g.,* Ameren Comments at 19-22; CenturyTel Comments at 10-14; Knology Comments at 5-6; Qwest Comments at 2-4.

[11] AT&T Comments at 22-25 (citing *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.,* 534 U.S. 327, 336-37 (2002) ("*NCTA*")).

[12] *See* Comments of MI-Connection Communications System at 2-3 ("MI-Connection Comments").

However, MI-Connection premises this argument upon sections 224(d) and (e), without even acknowledging the language in section 224(b)(1) or the definition of "pole attachment" in section 224(a)(4). These latter provisions were interpreted by the Supreme Court in *NCTA* as vesting the Commission with a general regulatory mandate to set just and reasonable pole attachment rates.[13] The Supreme Court's decision makes clear that the Commission has authority to regulate pole attachments used for broadband Internet access service.

MI-Connection erroneously argues that section 706 does not authorize the Commission to adopt a uniform broadband rate because this provision "pertains only to telecommunications, and does not apply to cable services or information services."[14] While section 706 may not be a grant of independent authority, it is not as nearly limiting as MI-Connection suggests.

Section 706 sets forth Congress's mandate that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...." As defined by Congress, "advanced telecommunications capability" is synonymous with broadband.[15] The Commission has interpreted section 706 as a directive "to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of *advanced services*," such as broadband.[16] MI-

---

[13] *NCTA,* 534 U.S. at 338-39.

[14] MI-Connection Comments at 3.

[15] 47 U.S.C. § 706(c)(1) (defining "advanced telecommunications capability as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology").

[16] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶ 69 (1998) (emphasis added); *see also Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, FCC 08-87, ¶ 10 (rel.

Connection's argument that "advanced telecommunications capability" somehow excludes broadband services thus flies in the face of section 706 itself. And insofar as this argument would exclude broadband Internet access service from the scope of section 706, it would rob that provision of its core purpose. As commenters recognize, adoption of a uniform rate for pole attachments used for broadband Internet access service would be consistent with the purpose of section 706, notwithstanding MI-Connection's claims to the contrary.[17]

2. A broadband pole attachment rate that applied to all broadband providers except ILECs would be neither "uniform" nor reasonable.

In the *Pole Attachment NPRM*, the Commission tentatively concluded "that *all categories of providers* should pay the same pole attachment rate for all attachments used for broadband Internet access service ...."[18] While ostensibly supporting this tentative conclusion, various commenters – namely ELCOs, cable operators, and CLECs – urge the Commission to establish a

---

March 21, 2008) (finding that prohibiting carriers from entering into exclusivity contracts for the provision of telecommunications services furthers the mandate of section 706 "[b]ecause allowing the imposition of restrictions on competitive offerings to residents in a multiunit premise would deter competitors from offering broadband service in combination with video, voice, or other telecommunications services ...") ("*Competitive Networks Order*").

[17] *See, e.g.,* COMPTEL Comments at 29 (adoption of "a competitively-neutral, single unified rate applicable to all attachers" is necessary "to advance the policy goal of broadband deployment articulated by Congress in Section 706 of the Communications Act").
The authority of the Commission to establish a uniform rate for all pole attachments used for broadband Internet access services is a separate and distinct issue from the propriety of the specific rate the Commission decides to adopt, which is an issue upon which commenters strenuously disagree and which seems to be MI-Connection's primary concern. MI-Connection Comments at 6-7 (complaining that "applying a higher pole attachment rate to a broad definition of broadband attachments will actually discourage broadband deployment ...").

[18] Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, ¶ 36 (2007) ("Pole Attachment NPRM") (emphasis added).

"uniform" pole attachment rate that would apply to all broadband providers except ILECs.[19] In a classic case of doublespeak, these commenters praise the benefits of a "unified" pole attachment regime but at the same time desire the perpetuation of the current system under which ILECs generally pay higher pole attachment rates than other broadband providers – a system that serves these commenters' financial and competitive self interests.

In a feeble attempt to rationalize this irrational position, the State Cable Associations argue that applying a uniform broadband rate to ILECs is "more complicated," because ILECs are not "similarly situated" to other broadband providers by virtue of ILECs enjoying "pole attachment rights and benefits that are far superior to cable in their agreements with electric utilities."[20] Whether ILECs are "similarly situated" to other broadband providers with respect to poles is irrelevant to whether ILECs should enjoy the benefits of "just and reasonable" pole attachment rates, either under section 224(b) or through the exercise of the Commission's ancillary jurisdiction -- issues that are discussed in greater detail below. Neither section 224(b) nor Title I draws the artificial distinctions between providers that cable operators and their trade associations seek to draw.

Nor do any ostensible advantages that ILECs are claimed to enjoy with respect to pole attachments – whether by virtue of history, size, or some other reason – have any bearing on the

---

[19] *See, e.g.,* State Cable Association Comments at 22-23; Alabama Power Comments at 11-12; Comcast Comments at 24-30; Time Warner Cable Comments at 7-10; Alpheus Comments at 4-5.

[20] State Cable Association Comments at 22-23; *see also* Alabama Power Comments at 11-12; Comcast Comments at 24-30 (alleging that ILECs should not be entitled to "parity" for purposes of pole attachment rates because they "obtain greater pole attachment benefits from utilities"); Comments of National Cable & Telecommunications Ass'n at 15-16; Time Warner Cable Comments at 7-10.

importance of ensuring consistent regulatory treatment of competing broadband platforms.[21] As the Commission has explained, consistent regulatory treatment of competing broadband platforms "best facilitates the goals of the Act, including promoting the ubiquitous availability of broadband Internet access services to all Americans."[22] The Commission recently reiterated this point when it expanded the prohibition on contractual exclusivity to the provision of telecommunications services in residential multiple tenant environments, noting that its decision was supported by "section 706 and our goal of regulatory parity ...."[23] This same reasoning applies equally to the creation of a true uniform rate that applies to *all* broadband pole attachments.

ELCOs attempt to carve out ILECs from the benefit of a "uniform" broadband rate by pointing to joint use agreements to which they are parties.[24] The ELCOs' motivation in doing so is clear – they seek to preserve the lucrative rental rates paid by ILECs pursuant to obsolete rate arrangements in these decades-old joint use agreements. While joint use agreements are important in facilitating the provision of electrical and communications services, the conceptual

---

[21] See, e.g., Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to its Broadband Services, Memorandum Opinion and Order, WC Docket No. 06-125, ¶ 46 (granting forbearance from dominant carrier regulation for certain AT&T broadband services because doing so would "serve the public interest by eliminating the market distortions that asymmetrical regulation of these services causes") (rel. Oct. 12, 2007).

[22] *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report & Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14865, ¶ 17 (2005), *aff'd Time Warner v. FCC,* 507 F.3d 205 (3d Cir. 2007).

[23] *See Competitive Networks Order*, ¶ 10.

[24] *See, e.g.,* Alabama Power Comments at 6-14; Allegheny Power Comments at 61-70; EEI Comments at 48-54; Comments of Oncor Electric Delivery Company at 23-30 ("Oncor Comments"); UTC Comments at 17-20; Time Warner Cable Comments at 46-49.

underpinnings of the pole attachment rate provisions of those agreements have long since disappeared. As AT&T explained in its comments, as a result of fundamental change in the space requirements of the electric and telephone industries, the significant increase in the number of attaching parties on utility poles, and, as described below, the dramatic disparity in ELCO-owned joint use poles, the assumptions underlying pole attachment rates in existing joint use agreements are no longer valid.[25]

While ELCOs uniformly assert that that ILECs enjoy equal bargaining power because they own poles of their own, such assertions are not borne out by the facts.[26] ELCOs own 75 to 80 percent of the utility poles in the country, with ILECs currently owning the remainder. This hardly places ILECs on level footing with the electric utilities. That ILECs enjoy little or no bargaining power when it comes to pole attachment rates is evidenced by the fact that: (1) ILECs such as AT&T routinely face ELCO demands for ever increasing pole attachment rates – not because the costs of poles are increasing exponentially, but rather because pole ownership and pole usage have changed in ways that favor the ELCOs; and (2) ELCOs adamantly refuse to update their joint use agreements with the ILECs to reflect these changed conditions.[27]

ELCOs dispute the notion that they have any financial incentive to overcharge for pole attachments, insisting that, by virtue of rate-of-return regulation, pole attachment revenues

---

[25] *See* AT&T Comments at 3-10; Declaration of Veronica Mahanger MacPhee ¶¶ 5-30; *see also* Reply Declaration of Veronica Mahanger MacPhee ¶¶ 2-10 ("Mahanger Reply Declaration").

[26] *See, e.g.,* Florida Power Comments at 8; Oncor Comments at 26-28; Alabama Power Comments at 10.

[27] Mahanger Reply Declaration ¶¶ 3-7 & 14-17.

merely offset rates customers pay for electricity.[28] But this is simply not true. Increased ELCO revenues do not necessarily flow through to customers in the form of lower electrical rates because rate-of-return regulation uses a test period to forecast revenues and expenses.[29] That forecast is based on a determination of the projected regulated rate base (*e.g.*, the utility's assets that are "used and useful" for providing services, less accumulated depreciation and other adjustments),[30] the authorized rate of return, and the utility's operating expenses for the test period. If the forecast turns out to be inaccurate and a utility earns more than was forecast, the utility's shareholders – not consumers – are the immediate beneficiaries, absent some self-effectuating adjustment mechanism in place, which does not exist for most electric utilities. Thus, between rate cases, electric utilities have every incentive to maximize the revenue from ILEC pole attachments in order to bolster their bottom line. Furthermore, to the extent that an ELCO is not subject to rate-of-return regulation but is governed by an alternative regulatory regime similar to price cap regulation, ELCOs would have every incentive as well as the ability to use pole attachment revenues for the benefit of their shareholders.

---

[28] *See, e.g.,* Idaho Power Comments at 7-9 (alleging that under rate-of-return regulation, any dollar the utility receives from pole attachment fees "is one less dollar that can be charged for energy sales to utility customers"); Allegheny Power Comments at 22 (claiming that "traditional electric utility cost of service proceedings require utilities to include all revenues from pole attachments as an offset to their revenue requirements").

[29] For example, for interstate ratemaking purposes, the Commission's test period is usually a prospective 12-month period, that is, the test period projects revenue and expenses for the immediate 12-month future. *See, e.g.,* 47 C.F.R. 61.38(b)(1)(ii).

[30] *See* 47 C.F.R. 65. Subpart G, for a description of allowable and disallowable assets a rate of return carrier uses to establish its federal rate base.

EEI presents several purported justifications for perpetuating pole attachment rates under joint use agreements and exempting the ILECs from any broadband pole attachment rate developed by the Commission, none of which has merit.[31] First, EEI insists that ILECs enjoy contractually reserved space under their joint use agreements with ELCOs, providing them with flexibility. But this is not the case. Since 1978, when Congress granted cable operators the right to access utility poles, ILECs effectively ceased having the protection of reserved space on ELCO poles, and now the space previously "reserved" for the ILEC on two-party poles of early joint use is used by cable operators and CLECs. The ILEC gains little "flexibility" from unavailable space that has been allocated to a competitor.[32]

Second, EEI's argument that joint use agreements have been in effect for many years proves nothing.[33] It is beyond dispute that the rate provisions in joint use agreements executed years ago reflect assumptions that no longer hold true, and the equal or joint arrangement that once existed between local telephone and electric companies is a thing of the past. In the face of the number of additional users in the space the ILECs' 40-50 percent cost allocation percentage once bought, it is unreasonable for ELCOs to continue to insist that ILECs continue paying close to 50 percent of ELCOs' pole costs.[34]

Third, EEI erroneously claims that, because joint use agreements involve the ownership of pole plant, they are "pervasively regulated under state and local laws and regulations," which, according to EEI, would make it "very difficult, if not impossible, for the Commission to

---

[31] *See* EEI Comments at 50-52.

[32] Mahanger Reply Declaration ¶ 8.

[33] *See* EEI Comments at 52; *see also* Oncor Comments at 24-25.

[34] Mahanger Reply Declaration ¶ 9.

regulate pole attachment rates within the context of such agreements ...."[35] To the extent that a state has certified that it regulates pole attachment rates, the Commission does not regulate pole attachments in that state. However, the majority of states do not regulate pole attachment rates, and the Commission has the authority and the duty to regulate pole attachment rates in those states. No exception exists for pole attachment rates that may happen to be set forth in a joint use agreement.[36]

Notwithstanding ELCO claims to the contrary, ILECs are not seeking to avoid their fair share of costs.[37] Rather, they are seeking to pay their equitable, reasonable and consistent allocation of the cost of a standard pole. The loss by the ILECs of their historical reserved space as a joint user, the corresponding escalation of electric utility revenue from sublease of that space, the proliferation of competitors currently enjoying the same pole usage benefit for much less cost, and the ownership of the vast majority of poles by the nation's electric utilities, all dictate this result.

---

[35] EEI Comments at 52-53.

[36] Mahanger Reply Declaration ¶ 10.

[37] The contention that electric utilities bear 100% of the cost of construction of the pole distribution systems is inaccurate. *See* Allegheny Power Comments at 22-23. The premise underlying joint use between telephone and electric companies, and governing the establishment of rates, has historically been the equitable allocation of the costs and benefits of joint use. Rate formulas under traditional joint use agreements typically include the use and application of an annual charge component which represents the full cost to the pole owner to own and maintain a joint use pole, *including the owner's cost of capital.* Thus, the rental rates paid by ILECs pursuant to such formulas have been predicated upon the premise that the pole owner actually incurs no capital outlay for joint use, but in fact borrows the total funds representing its capital investment in the pole, with the joint user paying its allocated share of the cost of money. In short, ILECs have been carrying some 40-50 percent of the cost of shared poles since the inception of joint use, including the cost of money to construct the entire joint pole plant, and irrespective of putative pole ownership. This is also the case under the Commission's methodology. Mahanger Reply Declaration ¶ 12.

B. ILECS Are Entitled To Just And Reasonable Pole Attachment Rates.

1. ILECs are "providers of telecommunications service" entitled to just and reasonable pole attachment rates under section 224.

ELCOs, cable operators, and CLECs generally argue that ILECs are not entitled to just and reasonable pole attachment rates under section 224(b).[38] These commenters' arguments boil down to a single, erroneous legal theory: notwithstanding Congress's use of two distinct terms in different provisions of section 224 that confer different rights, those terms should be construed to mean the same thing. Because Congress excluded ILECs from the definition of "telecommunications carrier" for purposes of section 224, those portions of section 224 that apply to "telecommunications carriers" do not apply to ILECs.[39]

But where Congress deliberately employed a different statutory term, such as in section 224(a)(4) where it used the term "providers of telecommunications service," that term must be given its ordinary meaning without regard to the carve-out that applies to "telecommunications carriers." Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service ...." ILECs are "providers of telecommunications service" because they offer telecommunications service "for a fee directly to the public."[40] Section 224(b)(1) gives the Commission authority "to regulate the rates, terms,

---

[38] *See, e.g.,* Florida Power Comments at 2-4; Oncor Comments at 23-26; PacifiCorp Comments at 3-7; UTC Comments at 17-20; EEI Comments at 48-50; Comcast Comments at 24; Alpheus Comments at 4-5.

[39] *See, e.g., See Clay v. United States*, 537 U.S. 522, 528 (2003) ("Disparate inclusion[s] or exclusion[s] in the same statute are presumed intentional"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each").

[40] 47 U.S.C. § 153(46) (defining "telecommunications service").

and conditions for pole attachments ...." ILECs thus enjoy a statutory right to just and reasonable pole attachment rates under section 224(b)(1).

The distinction between "telecommunications carriers" and "providers of telecommunications services" in section 224 is not some regulatory anomaly or the result of sloppy drafting.[41] Rather, it reflects a deliberate policy choice. The term "telecommunications carrier" is generally used in section 224 in provisions that give the Commission authority to regulate *access* to poles. It is understandable that Congress may have concluded that ILECs did not need regulatory protection in order to obtain *access* to poles, since ILECs generally had long since obtained such access or been pole owners themselves.[42] In contrast, the provisions of section 224 that govern the rates, terms, and conditions that apply once access has been obtained apply more broadly because Congress recognized that merely obtaining access does not guarantee that such access will continue to be provided on just and reasonable terms.[43]

---

[41] Although Comcast insists that the terms "provider of telecommunications service" and "telecommunications carrier" are "interchangeable" and that their use "simply reflects a stylistic distinction ... rather than a substantive difference," Comcast Comments at 49-50, the Supreme Court in *Russello* rejected the view that Congress's use of different terms in the same statute should be ascribed "to a simple mistake in draftsmanship." 464 U.S. at 23.

[42] *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶ 49 (1998) (discussing amendment of section 224(a)(4)) ("*Implementation Order*") (noting Congress's determination that "ILECs generally possess [] access" to poles, ducts, and conduit).

[43] *See, e.g.,* 47 U.S.C. § 224(h) (referring to "entity that has obtained an attachment"); 47 U.S.C. § 224(i) (referring to an "entity that obtains an attachment"). The assertion that ILECs cannot be "providers" under section 224(a)(4) because such a reading would require the Commission to regulate ILEC attachments to their own poles is nonsensical. *See* UTC Comments at 64; Time Warner Cable Comments at 49. Far from being the statutory "oddity" these commenters suggest, the Commission routinely regulates the rates that an ILEC charges to itself or its affiliates. *See, e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements,* Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, ¶ 100 (2007) (requiring Bell Operating Companies and their independent ILEC affiliates "to charge any non-section 272 affiliate through which they provide in-region, long distance

Contrary explanations provided by commenters are unconvincing. For example, the Utilities Telecom Council argues that Congress chose the term "provider" in order to cover only cable operators that additionally provide telecommunications services.[44] The legislative history of the Telecommunications Act of 1996 ("1996 Act") does not support this argument. Prior to the 1996 Act, section 224(a)(4) narrowly defined a pole attachment as "any attachment by a cable system." The amendments to section 224 adopted as part of the 1996 Act, however, expanded the definition to include "any attachment by a cable system or provider of telecommunications service."[45] The conference reports of both the House and Senate state that amended section 224(a)(4) "expands the scope of the coverage of section 224 … to include attachments by *all providers of telecommunications services*," not just cable operators that provide telecommunications service.[46] The legislative history provides no support for the argument that the phrase "all providers of telecommunications services" actually was intended to cover only cable entities that provided mixed services. In fact, Congress explicitly recognized

---

services the same amount for access that they would have charged a section 272 separate affiliate …"); 47 U.S.C. § 224(g) (requiring a utility engaged in the provision of telecommunications or cable services "to impute to its costs of providing such services … an equal amount to the pole attachment rate for which such company would be liable under this section"); 47 U.S.C. § 203 (requiring a common carrier to "file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication ….").

[44] UTC Comments at 17.

[45] *See Implementation Order*, ¶ 40.

[46] S. Rep. No. 104-230, at 206 (1996); H.R. Rep. No. 104-458, at 206 (1996) (emphasis added).

that the class of "providers of telecommunications services" includes, but is broader than, cable providers.[47]

Comcast argues that ILECs are not included in the class of attachers intended to be protected because an ILEC providing telecommunications service does not fall within the definition of a "cable television system" under section 224(d)(3) or a "telecommunications carrier" under section 224(e)(1), which, according to Comcast, are the only provisions that authorize the Commission to adopt a formula prescribing pole attachment rates. Thus, Comcast theorizes that, while the Commission may have the authority to "regulate" ILEC pole attachments under section 224(b)(1), it has "no statutory authority" "to set a formula adopting rates" for such attachments, which Comcast insists would be an "absurd result."[48]

Comcast's theory cannot be reconciled with *NCTA*, in which the Supreme Court rejected this very same strained reading of section 224. In upholding the Commission's decision to establish a rate formula for pole attachments used to provide commingled cable television and broadband Internet access services, the Court relied upon the Commission's broad authority under section 224(b)(1). According to the Court, sections 224(e)(1) and 224(d)(3) "are simply subsets of – but not limitations upon –" section 224(b)(1), which authorizes the Commission to "prescribe just and reasonable rates … without necessary reliance upon a specific statutory formula devised by Congress."[49]

---

[47] *See* H.R. Conf. Rep. 104-458, at 206 (stating that section 224 extends to "pole attachments for all providers of telecommunications services, including such attachments used by cable television systems…").

[48] Comcast Comments at 49-50, n.161.

[49] *NCTA,* 534 U.S. at 336.

Several commenters make much of the Commission's observation that "because ... an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable system operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities."[50] These commenters conveniently ignore that the Commission made this observation in the context of explaining *access* rights – not rights to just and reasonable rates – under the Act. The sentence immediately following the "no rights" language makes this clear as the Commission noted that its interpretation "is consistent with Congress' intent that Section 224 promote competition by ensuring the *availability of access* to new telecommunications entrants."[51] The Commission has never suggested, let alone held, that ILECs are not subject to the protections of section 224(b).

EEI's assertion that it would be "arbitrary and capricious" for the Commission to recognize a distinction between the statutory terms "telecommunications carrier" and "provider of telecommunications service" is misguided.[52] The arbitrary-and-capricious standard applies when an agency reverses prior policy.[53] Here, as noted above, the Commission has never expressly addressed whether ILECs are entitled to just and reasonable pole attachment rates under section 224(b) as providers of telecommunications service. And, notwithstanding EEI's assertion to the contrary, the Commission previously has acknowledged the distinction between

---

[50] *Implementation Order* ¶ 5; *see, e.g.*, Time Warner Cable Comments at 52; EEI Comments at 122, n.135.

[51] *Implementation Order* ¶ 5 (emphasis added).

[52] EEI Comments at 112.

[53] *See Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-42 (1983) (applying the arbitrary-and-capricious standard only in cases involving reversals in agency policy).

"carriers" and "providers," stating that the exclusion of ILECs from the class of carriers says nothing about the rights of providers to just and reasonable rates.[54] Thus, if anything, an explicit holding by the Commission that ILECs are providers of telecommunications service subject to the protections of section 224(b) would represent the logical extension, and not the reversal, of prior agency policy.

Equally misguided are claims that the language in section 224(f) demonstrates that the terms "carrier" and "provider" mean the same thing.[55] Section 224(f)(1) states that utilities must provide access to "any telecommunications carrier" on a nondiscriminatory basis and section 224(f)(2) grants utilities the power to refuse access to telecommunications carriers based on a number of grounds, including safety or insufficient capacity. According to EEI, the terms "carrier" and "provider" must be synonymous because section 224(f) otherwise would lead to the "absurd" result that a utility could deny a carrier access to a pole for safety reasons but could not deny a provider.[56]

This flawed reading of section 224(f) fails to recognize that the Act lays out independent and severable rights with respect to pole attachments. Section 224(f)(1) sets forth a *carrier's* right to access poles and the attendant right of pole owners to deny access to *carriers* under specified circumstances – it says nothing about the rights of utilities to regulate attachments after such access has already been provided. And rightly so, because other statutory provisions already cover that ground. Specifically, in sections 224(h) and (i), Congress addressed the rights and responsibilities of pole owners with respect to the modification, alteration, rearrangement, or

---

[54] See Implementation Order, ¶ 49.

[55] *See* § 224(f)(1) and (2); EEI Comments at 115-16; PacifiCorp Comments at 5.

[56] EEI Comments at 115-16.

replacement of existing attachments. In doing so, Congress used the phrase "any *entity* that has obtained access," which clearly is broader than the term "telecommunications carrier."[57] Use of the term "entity" underscores Congress's intent to distinguish between the right of access to poles under section 224(f), which ILECs do not enjoy, and other pole attachment rights – such as the right to just and reasonable rates under section 224(b) and rights with respect to existing attachments affected by actions of pole owners under sections 224(h) and (i) – which ILECs do enjoy.

EEI's reliance upon section 224(c) – a provision that addresses state, not federal, pole attachment regulation – fares no better.[58] Section 224(c)(1) provides that the Commission has no jurisdiction over "rates, terms, and conditions, or access ... as provided in subsection (f)" when states have undertaken regulation of pole attachments themselves. Sections 224(c)(2) and (3) go on to enumerate conditions of state regulation of "rates, terms, and conditions" for attachments. EEI makes the inexplicable analytical leap that omission of the term "access" from sections 224(c)(2) and (3) indicates that "rates, terms and conditions are inextricably tied to access" under the Act, which, according to EEI, proves that Congress intended the rights to access and to just and reasonable rates to be non-severable.

No legal basis exists to conclude that Congress's failure to repeat the term "access" in sections 224(c)(2) and (c)(3) indicates its belief that "access" could simply go unrepeated because it is self-evident that rights to access and rates are so intertwined. On the contrary, Congress's failure to repeat the term "access" in sections 224(c)(2) and (3) reflects Congress's

---

[57] 47 U.S.C. § 224(h) (emphasis added); *see also* 47 U.S.C. 224(i) (relieving "[a]n *entity that obtains an attachment* to a pole, conduit, or right-of-way" from bearing the cost of rearranging or replacing its attachment under specified circumstances) (emphasis added).

[58] EEI Comments at 116.

understanding that access is different from, and not included within the meaning of "rates, terms, and conditions."

Furthermore, repetition of "access" in sections 224(c)(2) and (3) would be nonsensical. Use of "access" in section 224(c)(1) explicitly refers to the nondiscriminatory right to access "provided in subsection (f)" – a federal right enforced only by the Commission. It would have been absurd for Congress to require in sections 224(c)(2) and (3) that states certify that they are regulating the right to nondiscriminatory access under section 224(f) when states play no role in the enforcement of that provision. Twist the statutory language as EEI may, section 224(c) does not support EEI's theory that the right to pole access and the right to reasonable pole attachment rates are inextricably intertwined under federal law.

2. The Commission also has Title I authority to ensure that ILECs are not forced to pay unjust and unreasonable rates for pole attachments used to provide broadband Internet access service.

Although section 224 generally speaks to pole attachments, the Commission also has ancillary authority to ensure that ILECs only pay just and reasonable rates for pole attachments used to provide broadband service in order to give full effect to section 706.[59] The Commission has well-established, albeit limited, ancillary authority to issue orders, "as may be necessary in the execution of its functions," including by issuing orders necessary to give full effect to the statutory provisions that the Commission is charged with enforcing.[60] Such is the case here with

---

[59] *See, e.g., Universal Service Contribution Methodology,* Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 48 (2006) (relying upon permissive authority under section 254(d) as well as its ancillary jurisdiction under Title I to extend universal service contribution obligations to interconnected VoIP providers).

[60] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968) (affirming Commission's regulation of community antenna television services despite lack of express statutory authority).

respect to meeting Congress's directive in section 706 to promote broadband deployment by ensuring that ILECs are not forced to pay unjust and unreasonable rates for pole attachments used to provide broadband Internet access service.

Both the Commission and the courts have long recognized that the Commission may exercise ancillary jurisdiction as a basis for adopting measures that are directly ancillary to the Commission's express responsibilities and are necessary to effectuate and further the purposes of those express statutory responsibilities.[61] In *Southwestern Cable*, the first case to recognize this authority, the Supreme Court affirmed the Commission's regulation of community antenna television ("CATV") services, despite the lack of express statutory provisions governing the regulation of CATV.[62] After noting the potential for CATV services to undermine the effectiveness of the Commission's rules aimed at facilitating the orderly development of broadcast television, the Court concluded that the Commission possesses authority to take steps that are "reasonably ancillary to the effective performance of the Commission's various responsibilities" and that further the purposes of the Act.[63] The Commission has relied upon its ancillary authority on numerous occasions to adopt rules to promote broadband deployment,

---

[61] The Commission has invoked several statutory provisions to support the exercise of limited ancillary jurisdiction in appropriate cases. Section 4(i) of the Communications Act permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 303(r) directs the Commission to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter...." 47 U.S.C. § 303(r). In particular contexts, the Commission has also pointed to Sections 1 and 2(a) of the Communications Act to support the exercise of ancillary jurisdiction. *See* 47 U.S.C. §§ 151, 152(a).

[62] 392 U.S. at 177-78.

[63] *Id.* at 178.

most recently in prohibiting common carriers from entering into or enforcing exclusive access contracts in serving residential multiple tenant environments.[64]

At the same time that it recognized the existence of the Commission's ancillary authority, the Supreme Court also held that the Commission's ancillary authority is limited in its reach. The Court concluded that the Commission possessed authority to "issue such orders, not inconsistent with this (Act), as may be *necessary* in the execution of its functions."[65] Likewise, this authority only supports regulation reasonably ancillary to the express statutory provisions that the regulation is intended to further.[66] *Id.* Later cases similarly recognize that the Commission may exercise ancillary jurisdiction, while also holding that this jurisdiction is limited to actions that further an express statutory responsibility.[67]

---

[64] *Competitive Networks Order* ¶ 2 (noting that "the prohibition we adopt herein will not only materially advance the 1996 Act's goals of enhancing competition, but also the goal of broadband deployment"); *see also Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, ¶¶ 52-54, n.167 (rel. Nov. 13, 2007) ("*Video Nonexclusivity Order*").

[65] *Southwestern Cable Co.,* 392 U.S. at 181 (emphasis added); *see also United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act … and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act").

[66] *Id.* at 178.

[67] *See American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citing *Southwestern Cable*, 392 U.S. at 177-78); *see also Video Nonexclusivity Order*, ¶ 52 (noting that in order for the Commission to exercise its ancillary authority, the regulation "must cover interstate or foreign communications by wire or radio" and "be reasonably ancillary to the Commission's statutory mandated responsibilities").

Here, the Commission's establishment of a uniform rate that would apply to all broadband pole attachments would remove distortions in the broadband market by ensuring consistent regulatory treatment of competing broadband platforms. It also would remove disincentives to invest in and deploy broadband infrastructure by eliminating the use of pole attachment as a revenue stream that artificially inflates the cost of broadband service. Thus, Commission action is reasonably ancillary to the Commission's statutory responsibility under section 706, and indeed is necessary to give full effect to that provision. Otherwise, broadband deployment, particularly in rural areas, will be frustrated by the distortions resulting from competing broadband providers paying different broadband pole attachment rates and by increased broadband prices resulting from ELCO demands for unjust and unreasonable rates for ILEC broadband pole attachments. [68]

3. Any pole attachment rate to which an ILEC is subject that exceeds just and reasonable levels is unlawful and unenforceable.

ELCOs complain that, because of the varied terms of existing joint use agreements, it would be unreasonable for the Commission to assert jurisdiction over ILEC pole attachment

[68] Exercise of the Commission's ancillary jurisdiction to establish a uniform rate for broadband pole attachments is not foreclosed by the "carve-out" in section 224(a)(5), even if the Commission were to construe this language to exclude ILECs from the protections of just and reasonable pole attachment rates under section 224(b)(1) – a construction that is inconsistent with the plain language of the statute and basic principles of statutory interpretation, as explained above. Section 224(a)(5) cannot reasonably be read as a Congressional determination that ILECs should pay unjust and unreasonable pole attachment rates, particularly for attachments used to provide broadband services. *Implementation Order*, ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants").

rates.[69] This complaint ignores that "[t]he Pole Attachment Act directs the Commission to ensure that terms and conditions are just and reasonable," and that "[i]f a term or condition of a pole attachment agreement is found to be unjust or unreasonable, it is unlawful."[70]

Once the Commission determines (as it must) that ILEC pole attachment rates are subject to just and reasonable protections – either under section 224(b)(1) or the Commission's ancillary authority under Title I – any rate assessed by an ELCO in excess of the statutory maximum is unenforceable because it would, by definition, be unjust and unreasonable. The form of the agreement in which an unjust and unreasonable rate may be contained is irrelevant. When confronted with such unreasonable contract terms for pole attachments, the Commission uniformly has held that attaching entities are "entitled to a rate adjustment or the [unreasonable] term or condition may be invalidated."[71] According to the Commission, utilities simply "may not charge more than the maximum amount permitted by the formulas developed by the Commission."[72]

The Commission's authority to invalidate unjust and unreasonable pole attachment rates extends to all pole attachments, even those made pursuant to joint use agreements executed years ago. In *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (per curiam), the

---

[69] Oncor Comments at 30; Alabama Power Comments at 6-14; Allegheny Power Comments at 61-70; EEI Comments at 48-54; UTC Comments at 17-20; Time Warner Cable Comments at 46-49.

[70] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 FCC Rcd 468, ¶ 25 (1989).

[71] Nevada State Cable Television Association v. Nevada Bell, 17 FCC Rcd 15534, ¶ 2 (2002); see also Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468, ¶ 25 (1989).

[72] *Nevada Bell,* 17 FCC Rcd 15534, ¶ 2.

District of Columbia Circuit considered a challenge to the Commission's authority to apply its pole attachment regime to release cable television operators prospectively from contracts that antedated the Act. In rejecting this challenge, the court of appeals noted that "[t]he statute itself is all-encompassing in its wording: the FCC is to 'regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable,' and is authorized to 'hear and resolve complaints concerning such rates, terms, and conditions.'"[73] The court concluded that the Act's "sweeping language" was consistent with its legislative history, which indicated Congress's desire to "act quickly" to protect consumers from the "numerous abuses of (the utilities') monopoly power."[74] The court thus held that the Commission has jurisdiction to resolve disputes between cable television operators and pole owners, "including those involving preexisting contracts, using the methods for calculating and apportioning costs that it has prescribed."[75]

Furthermore, the Commission has the jurisdiction to decide questions concerning the reasonableness of rates, terms, and conditions of an attachment, "regardless of the existence of an agreement between the parties."[76] For example, in *Alabama Power*, a cable operator and ELCO had a 20-year relationship, during which time the cable operator's attachments to the ELCO's poles were governed by agreements that provided for the cable operator to pay an

---

[73] *Id.* at 1257 (citing 47 U.S.C. § 224(b)(1)).

[74] *Id.* at 1256 (citation omitted).

[75] *Id.* at 1257.

[76] *Knology v. Georgia Power,* Order, 18 FCC Rcd 24615, ¶ 14 (2003); *see also Mile Hi Cable Partners v. Public Serv. Co. of Colo.,* Order, 17 FCC Rcd 6268 , ¶ 7 (2002) (noting the Commission's jurisdiction "to ensure that conditions of pole attachment agreements are just and reasonable"), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC,* 328 F.2d 675 (D.C. Cir. 2003).

annual pole attachment fee to the ELCO.[77] In June 2000, the ELCO announced that it was rescinding all existing agreements and demanded that the cable operator enter into new agreements with an annual rate of $38.81 instead of the $7.47 attachment rate the cable operator had been paying previously. The Commission had little difficulty finding that the ELCO's "unilateral rate increases, with the concomitant threat to dislodge" the cable operator's existing attachments "constitute unjust and unreasonable rates, terms, and conditions."[78] In doing so, the Commission declined to find that agreements voluntarily negotiated "are 'grandfathered' under the Pole Attachment Act as perpetual voluntary relationships."[79]

Pole attachment rates in joint use agreements are not sacrosanct or somehow shielded from the law. An ELCO's attempt to impose a rate that exceeds the maximum pole attachment rate established by the Commission, even if contained in an existing joint use agreement, would run afoul of the Act, and the Commission enjoys long-established regulatory jurisdiction to preclude enforcement of that rate.

4. The Commission has broad power to require that parties modify existing joint use agreements containing unlawful pole attachment rates.

In a transparent attempt to try to dissuade the Commission from adopting its tentative conclusion to establish a uniform broadband rate, various ELCO insist that the exercise of Commission jurisdiction over ILEC pole attachment rates would require that all existing joint

---

[77] Alabama Cable Telecommunications Ass'n v. Alabama Power Co., Order, 16 FCC Rcd 12209, ¶ 18 (2001) ("Alabama Power"), review denied sub nom. Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir. 2002).

[78] *Alabama Power*, 16 FCC Rcd 12209, ¶ 19.

[79] *Id.* ¶ 21.

use agreements be "thrown out."[80] No such requirement exists as a matter of federal law or should exist as a matter of sound public policy. In fact, in addition to its authority under the Pole Attachment Act, the Commission has the power, under the *Sierra-Mobile* doctrine, to "prescribe a change in contract rates when it finds them to be unlawful," without abrogating the entire contract.[81]

Under the *Sierra-Mobile* doctrine, "[b]efore changing rates, the Commission must make a finding that [the rates] are 'unlawful' according to the term of the governing statute, which typically requires a finding that existing rates are unjust, unreasonable, unduly discriminatory, or preferential."[82] As demonstrated above, any pole attachment rate charged by an ELCO in excess of the maximum permissible rate would be *per se* unjust and unreasonable.

Under the *Sierra-Mobile* doctrine, the Commission also must find that the unlawful rates "adversely affect the public interest."[83] Rates in antiquated joint use agreements that require ILECs to pay more for broadband pole attachments than other broadband providers necessarily

---

[80] Oncor Comments at 30.

[81] *Western Union Tel. Co. v. FCC*, 825 F.2d 1495, 1501 (D.C. Cir. 1987); *see also BellSouth Telecommc'ns, Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 969-70 (11th Cir. 2005).

[82] *Western Union*, 825 F.2d at 1501 n.2 (citing 47 U.S.C. §§ 202 and 205); *see generally United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956) (recognizing that the terms and conditions of utility contracts can be rendered unjust and unreasonable by intervening circumstances).

[83] *Western Union*, 825 F.2d at 1501 n.2 (quoting FPC v. Sierra Pac. Power Co., 350 U.S. 348, 354-55 (1956)); *In the Matter of ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 10 FCC Rcd 654 at ¶ 15 (*quoting Sierra*).

has an adverse impact on the public interest.[84] Such a regime only artificially inflates the cost of broadband services to the detriment of consumers.

Thus, the *Sierra-Mobile* doctrine authorizes the Commission to require a change in pole attachment rates in existing joint use agreements when it finds those rates to be unlawful. The Commission need not and should not disturb the other provisions of such agreements, notwithstanding ELCO claims to the contrary.

C. The Commission Should Reject ELCOs' Proposed Changes To The Current Pole Attachment Formulas.

Not only do the ELCOs want to preserve their ability to continue exacting unreasonable pole attachment rentals from ILECs, they also advocate various adjustments to the Commission's pole attachment formulas, which, if adopted, would do nothing more than inflate the maximum rates permitted under the Commission's rules. These ELCO proposals can be reduced to five main recommendations: (i) reduce the number of pole users to three in both urban and non-urbanized locations; (ii) reclassify the separation space on every jointly occupied pole as non-usable; (iii) allocate the non-usable space, including the separation space, equally to all pole users; (iv) not count the ELCO as an attaching entity that shares the cost of the non-usable space; and (v) eliminate the "subsidies" of other users that ELCOs claim permeate the rental rate methodology. Each of these proposals is without merit and should be rejected by the Commission.

---

[84] *See, e.g., Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended*, Memorandum Opinion and Order, 22 FCC Rcd 16304, ¶ 129 (2007) (finding that "disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers"); *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685, 4696, ¶ 21 (2005).

Reducing the number of attachers. The ELCOs dispute the accuracy of the current Commission's presumptions concerning the number of attachers on a utility pole, recommending that the number of pole users be reduced to three in all locations, both urbanized and non-urbanized, which would have the same effect as the ELCOs' other proposals – namely to increase maximum pole attachment rates.[85] AT&T agrees with the ELCOs that the Commission should abandon its "urbanized" versus "non-urbanized" dichotomy and should establish a single presumption of four attachers on a pole, regardless of location. While the ELCOs recommend that the Commission presume three attachers on a pole, the data offered by the ELCOs do not support this recommendation.[86]

Reclassifying the separation space. ELCOs continue to urge the Commission to reclassify the separation space on a pole as non-usable,[87] which would have the effect of increasing the pole's total non-usable space and disproportionately increasing each user's allocation of that space and thus the pole rental rate. There is no legitimate justification for this proposal, and EEI offers none. As the Commission has previously recognized, ELCOs actually use the separation space for the placement of electric facilities, while communications companies

---

[85] *See* Florida Power Comments, at 16; *see also* UTC Comments, at 22-24.

[86] Mahanger Reply Declaration ¶¶ 20-24. In addition to being unsupported by the data in the record, ELCO claims that the Commission should presume only three attachers ignores the ELCO's own evidence that four attachers on a pole is "the most common circumstance." *See* Ameren Comments at 25 ("In the case of Dominion Virginia Power and Ameren, the most common circumstance is that the pole is occupied by the electric utility, an ILEC joint user, and two linear attaching entities, usually a cable company and a CLEC.").

[87] *See* EEI Comments, at 103-104.

do not, and the Commission has again and again rejected ELCO attempts to designate the separation space as non-usable.[88] The Commission should do so likewise here.

Allocating non-usable space. The ELCOs also contend that all of the non-usable space should be divided equally among its users, not just two-thirds of it as is the case under the current telecom rate formula. Again, this recommended ELCO measure is intended to increase each pole user's share of the pole's space, and correspondingly, increase the rate each user pays the ELCO pole owner. This proposal is flawed because any approach that allocates the total cost of a joint pole's non-usable space in any manner other than in direct proportion to the users' respective allocations of the pole's useful space is unfair and unreasonable.[89]

Not counting the ELCO as an attaching entity. The ELCOs also ask the Commission to count only the operators of cable systems or providers of telecommunications services as attaching entities – that is, not to count the ELCO on the pole as an attaching entity – for purposes of assigning the cost of the common space.[90] In other words, the ELCO on the pole would pay only for the cost of the space it actually uses, but for none of the pole's supporting structure. This recommendation would once again further increase the other pole users allocated

---

[88] Mahanger Reply Declaration, ¶¶ 25-28 (citing Memorandum Opinion and Second Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, FCC 79-308, 72 F.C.C.2d, (May 23, 1979)).

[89] Mahanger Reply Declaration ¶¶ 29-35. To illustrate this point, assume a shared office building with 14 floors, 11 of which are occupied by one tenant alone, with two other tenants occupying 1 and 2 floors respectively. It would be absurd for the three tenants of the building to share its common costs – e.g., parking facilities, janitorial services, electricity, heat, etc. – equally. These common costs would be most fairly and reasonably allocated in direct proportion to the number of floors each tenant occupied, since this would be a fair and reasonable reflection of the relative benefit each tenant obtains from the building's shared or common support services. No less is true of a shared joint use pole, despite the self-serving equal allocation approach advocated by the ELCOs.

[90] EEI Comments at 79-80; UTC Comments at 105-106.

percentage of space and therefore cost, further compounding the accumulated effect of the ELCOs recommendations. This recommendation should be dismissed out of hand because it is a thinly veiled effort to provide the ELCOs on jointly used poles a free ride at the expense of other users, by relieving them of any obligation to pay for the poles' supporting structure.[91]

Eliminating other "subsidies." The ELCOs claim that their current rates provide non-specific "subsidies" to the attachers on their poles which need to be eliminated.[92] Such claims are impossible to reconcile with the fact that ELCOs typically collect up front the costs they incur in the form of "make-ready" work to accommodate a new attacher, which includes reimbursement of any cost, capital or expense, incurred by the ELCO. Such claims are particularly preposterous given that ILECs continue to reimburse the ELCOs for some 40-50 percent of their costs in the face of, and without offset for, the rental revenue flowing to the ELCOs from third-party attachers, including cable operators and CLECs.[93]

D. The Commission Should Reject ELCOs' Proposals to Address Unauthorized Attachments.

The Commission should likewise reject the proposals of certain ELCOs to adopt penalties for allegedly unauthorized attachments and safety violations.[94] An unauthorized pole attachment is an attachment to a pole that is not listed as one for which the attacher pays rent and typically comes to the pole owner's attention during a pole audit or inventory. An attachment can be

---

[91] Mahanger Reply Declaration ¶¶ 36-37.

[92] EEI Comments at 92-93; PacifiCorp Comments at 84.

[93] Mahanger Reply Declaration ¶¶ 38-42. The Commission also should not be swayed by ELCO proposals to modify the federal pole attachment formulas based on a few selective municipal or state pole attachment decisions, as the ELCOs urge. *See* Mahanger Reply Declaration ¶¶ 57-66.

[94] *See, e.g.*, EEI Comments at 79-80; UTC Comments at 79-81.

considered unsafe when it falls short of National Electric Safety Code ("NESC") specifications or an ELCO's internal guidelines.

ELCOs' characterization of how unauthorized attachments arise fails to present an accurate picture of current pole attachment practices. For example, the ELCO practice of "overbuilding" contributes substantially to the present disparity in pole ownership between ELCOs and ILECs. Overbuilding occurs when ELCOs place a taller pole beside an ILEC-owned pole without notifying the ILEC or requesting that it change out its poles, thereby forcing the ILEC to transfer its attachments to the new ELCO pole. During a pole audit, ELCOs consider an ILEC's failure to connect to the new pole an unauthorized attachment – a policy that is both illogical and unjust. By adopting the penalties the ELCOs suggest, the Commission would not only be endorsing the ELCOs' appropriation of ILEC poles, but punishing the ILECs for such behavior as well. [95]

ELCOs also ignore historical factors that militate against the Commission's adoption of penalties. Switches in pole ownership often occur in the wake of an emergency, such as when a pole is brought down in a storm. ELCOs are usually the first responder in such situations, and since the replacement pole comes from the ELCO pole yard, it will be recorded as an ELCO pole, even if the damaged pole was ILEC-owned. In reality, ILECs are rarely notified that their pole was replaced with an ELCO-owned pole. Yet the ELCOs argue that ILEC attachments to such poles should be punished, even though it is the ELCO's appropriation of the ILEC pole that renders the attachments "unauthorized." [96]

---

[95] Mahanger Reply Declaration ¶¶ 43-45 .

[96] *Id.* ¶ 46. ELCOs frequently replace ILEC poles and assume ownership over the new pole without notifying the ILEC in non-emergency situations as well, such as when ELCOs require taller or stronger poles to accommodate additional attachments. The Commission's

In AT&T's experience, drop attachments have become a new source of dispute. The vast majority of joint use agreements defined only distribution cable as a joint use attachment, so that incidental or peripheral attachments were not chargeable attachments. However, ELCOs have begun, unilaterally, to consider these as chargeable attachments, in direct contravention of the terms of the underlying joint use agreement, and thus count them as "unauthorized." There are ongoing disputes as to the ownership of drop poles as well, with both companies contending that it owns the pole. Disagreements about the "unauthorized" status of drop attachments and drop poles illustrates the problems with the ELCOs' approach to penalties. [97]

ELCOs' appeal for the need to remedy "safety violations" presents additional problems. In AT&T's experience ELCOs often issue citations for "safety violations" that actually are caused by an ELCO's own arbitrary addition of a foot of space beyond the NESC requirements to the ground clearance the ELCOs require. It also is a common practice for electric companies to hire consultants to inventory and conduct a "safety audit" of their entire plant, or portions thereof, often consisting of several hundred poles at a time. The "violations" discovered are often not caused by the ILEC, but by communications providers or the ELCOs themselves. For example, a safety violation can occur through no fault of an ILEC when an electric company subsequently places facilities such as a transformer onto the pole within the safety zone. Sometimes the purported "violations" do not even contravene NESC guidelines. Under such circumstances forcing an attaching entity which is not responsible for the alleged

---

adoption of penalties for unauthorized attachments would serve as an invitation to ELCOs to accelerate such practices. *Id.* ¶ 47.

[97] *Id.* ¶¶ 48-49 .

violation to "correct" it or to pay a "penalty" for its failure to do so would be unreasonable and unduly harsh.[98]

The bureaucratic and logistical burdens imposed on ILECs as a result of ELCO "safety audits" is vast and time-consuming. AT&T personnel must visit every pole identified in the audit to determine whether there is, in fact, a safety violation. This is a protracted process, and frequently AT&T fails to agree with the opinion of the electric company's consultant regarding the alleged violation, its validity, its cause, or the party responsible for its correction.[99] AT&T and other attaching entities must have the right to challenge and resist erroneous "safety" determinations.

The Commission thus must not grant blanket authority to the ELCOs to assert either "unauthorized attachments" or "safety violations," and to empower ELCOs to punish what they perceive as nonconforming attachments. Such authority would not only establish a presumption that ELCO allegations are accurate as to both the existence of the perceived problem and its cause, but also that they themselves are not responsible for the violations. The Commission should resist the ELCOs' proposal to impose penalties, recognizing that pole sharing is a complex endeavor best addressed by cooperative policies and systems, not punitive penalties and sanctions.

E. The Commission Should Reject ELCOs' Proposals to Carve Out Wireless Pole Attachments From the Protections of Section 224.

The Commission should decline the invitation by ELCOs to exclude wireless providers from the protections of section 224 and the benefit of a uniform broadband pole attachment

---

[98] *Id.* ¶¶ 50-52.

[99] *Id.* ¶ 53.

rate.[100] The plain language of the 1996 Act requires utilities, including ELCOs, to "provide … any telecommunications carrier with nondiscriminatory access to any pole, conduit, or right-of-way owned or controlled by it,"[101] and to apply "just and reasonable rates, terms and conditions" to such attachments.[102] Neither the statutory text nor the legislative history of the Act suggests that Congress intended to exempt wireless providers from these statutory protections. Moreover, the Commission has plainly and unambiguously recognized that "[w]ireless carriers are entitled to the benefits and protection of Section 224."[103]

Exclusion of wireless providers from the protections of section 224 also ignores Supreme Court precedent. In *NCTA*, the Court observed that the Commission has jurisdiction over attachments, including those made by wireless providers, not specifically enumerated in section 224, and that such attachments enjoy full rights to access and regulated rates. *NCTA* explicitly endorses the Commission's view expressed that section 224 applies to wireless providers.[104] Incredibly, one commenter goes so far to suggest that wireless providers are not covered because poles are not "bottleneck facilities" for wireless equipment, even though the Supreme Court went out of its way in *NCTA* to debunk this argument.[105] AT&T thus concurs with the position

---

[100] *See, e.g.*, Alabama Power Comments at 25-27; Allegheny Power Comments at 44-45.

[101] 47 U.S.C. § 224(f)(1).

[102] 47 U.S.C. § 224(b)(1).

[103] *Implementation Order*, ¶ 39.

[104] *See NCTA*, 534 U.S. at 341 (stating that the proposed distinction between wire-based and wireless attachments "finds no support in the text [of the Act]").

[105] *Compare* Alabama Power Comments at 26 *with NCTA*, 534 U.S. at 341.

expressed by several commenters that wireless providers, like all other telecommunications providers, are protected by section 224.[106]

F. The Commission Should Refrain From Micromanaging the Processes by Which Attachers Are Afforded Access to Poles.

Comments addressing Fibertech's request that the Commission adopt a set of "best practices" governing competitors' access to poles and conduits of ILECs and other utility owners of such facilities fall generally into two distinct camps. On the one hand, certain commenters blindly endorse Fibertech's proposed "best practices," without providing the Commission with any evidentiary basis demonstrating the need for such rules and without addressing the legal foundation for such measures. On the other hand, electric utilities and their trade associations generally oppose prescriptive federal regulation of pole attachment and conduit use by competitors – on the grounds that such rules are unnecessary and would be disruptive to and even unsafe for owners of these facilities and their personnel.

AT&T agrees with commenters that nondiscriminatory access to poles and conduit is necessary for the preservation of a competitive marketplace. Nevertheless, the importance of ensuring such nondiscriminatory access cannot justify adoption of prescriptive rules, absent probative record evidence of systematic problems that Fibertech's proposed rules are necessary to fix. Such evidence is wholly lacking here.

Some commenters supporting Fibertech's proposals do nothing more than regurgitate allegations in Fibertech's original petition filed in 2005 or in filings made in response to that

[106] *See, e.g.*, Comments of Crown Castle Solutions Corp. at 9-11; Comments of NextG Networks, Inc., 9-10; CTIA Comments at 6-7.

petition.[107] Other commenters make conclusory allegations without providing any underlying facts.[108] Many commenters endorsing Fibertech's proposals merely cite a limited number of "examples" of problems they allegedly have encountered without demonstrating that such problems extend beyond a particular geographic area or a particular utility.[109] Such "evidence" falls well short of satisfying the Commission's statutory obligations for adopting rules under both the Administrative Procedure Act and settled law.[110]

Furthermore, the Commission should not resort to imposing additional detailed regulations on utility owners of poles and conduit without first carefully evaluating the necessity

---

[107] *See, e.g.,* MetroPCS Comments at 7-8; Comments of segTel, Inc., at 5-6; Comments of WOW! Internet Cable and Phone at 1.

[108] *See, e.g.,* Knology Comments at 21 (alleging that "[u]tilities are notoriously slow during the make-ready process ..." without providing any evidence concerning the timeframes by which utilities have completed make-ready work); Comments of Cavalier Telephone LLC at 6 (alleging an "alarming" "disparity in time periods for utilities to grant access to their poles," claiming that "[s]ome utilities provide Cavalier access within three months after receiving an application, others take more than five times as long"); Alpheus Joint Comments, at 2 (alleging that "the length of time required for completion of make-ready work varies significantly" without providing any detailed facts); Comments of Crown Castle Solutions Corp. at 7 (alleging that "[d]elays of weeks or even months in providing responses to written comments, execution of final pole attachment agreements, or even simple status inquiries are common" without providing any detailed facts); Comments of Fibertech Networks, LCC and Kentucky Data Link, Inc. at 8 (alleging that it "can list numerous occasions ... where a utility has taken an inordinate amount of time to conduct a survey for space availability" but failing to provide such a list) ("Fibertech Comments").

[109] *See, e.g.,* Comments of NextG Networks, Inc. at 5-6 (alleging that it "has been subject to unreasonable access denials and excessive, but unnecessary, make-ready delays and costs," pointing to complaint filed against Public Service Electric & Gas).

[110] *See* 5 U.S.C. § 706(2)(E) (a reviewing court "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... unsupported by substantial evidence ..."); *see also NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982) (agency rulemaking must be "rational," have "support in the record," and be "based on a consideration of the relevant factors"); *HBO v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (holding that "the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based").

for such detailed regulation. Negotiations, rather than prescriptive regulatory directives, should be the preferred avenue for parties to utilize in reaching cost-effective agreements that minimize the time intervals necessary to begin providing service to end-user customers, while ensuring that issues affecting worker safety and network integrity are properly reflected. AT&T's experience confirms that negotiated arrangements between owners of poles and conduits and other prospective users of those facilities generally can be successful, at least where the pole owner is subject to Commission oversight.

In fact, at least for the areas served by AT&T, such negotiations (and, where necessary, arbitrations before state commissions) have obviated any need for several of Fibertech's proposed rules. For example, while Fibertech requests that the Commission adopt a rule permitting CLECs to use their own personnel to conduct searches in conduit owners' records to determine the availability of conduit space,[111] the Interconnection Agreements ("ICAs") for all of AT&T's ILEC affiliates already allow CLEC personnel to conduct such records searches, subject to the reasonable justified condition that AT&T personnel first redact such records to protect the identity of other users of the conduit space. Similarly, Fibertech requests that CLECs be permitted to use utility-approved contractors to work in manholes to install fiber in conduit and perform other tasks without continuous supervision by ILEC personnel.[112] Once again, pursuant to their ICAs, all AT&T ILEC affiliates already permit CLECs to make such use of AT&T-approved contractors, subject to oversight by an AT&T representative which is generally conducted through periodic site visits, rather than through continuous on-site presence of an AT&T employee.

---

[111] Fibertech Comments at 32-37.

[112] *Id.* at 41- 44.

Finally, although overlooked by Fibertech and its supporters, a utility's obligation under section 224(f)(1) is limited to providing "nondiscriminatory access" to poles, ducts, and conduit. Many of Fibertech's proposals ignore this limitation and instead seek superior access. For example, while Fibertech requests that the Commission require pole owners to allow CLEC use of boxing and extension arms in specified circumstances, AT&T's ILEC operations as a general rule do not support boxing or extension arms for space gain for their own use.[113] Similarly, Fibertech requests that the Commission establish shorter survey and make-ready time periods, without regard to whether the current timeframes by which AT&T and other utilities perform surveys and complete make-ready work are nondiscriminatory.[114]

There is no legal justification, and Fibertech offers none, for conferring on third parties a preferred status with respect to access to poles, ducts, and conduit that is superior to that of the owners of such facilities under the guise of "nondiscrimination." The Eighth Circuit made this point clear in *Iowa Utilities Board v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, AT&T Inc. v. Iowa Utilities Board,* 525 U.S. 366 (1999), in which the court struck down the Commission's rule that required ILECs to provide interconnection and unbundled network elements superior in quality to those that the ILEC provided for itself. In so doing, the court of

---

[113] AT&T's ILEC operations may, however, make limited use of these techniques for purposes other than space gain (e.g., for load balancing). That AT&T does not support boxing or extension arms for space gain for its own use readily distinguishes situations in which a pole owner allows boxing when in its own interest but prohibits a competing carrier from boxing. *See* Fibertech Comments at 16-17 (citing *Salsgiver Comm'cns, Inc. v. N. Pittsburgh Tel. Co.,* Memorandum Opinion and Order, 22 FCC Rcd 20536 (2007)).

[114] Many factors may affect a facility owner's ability to provide access to poles, ducts, or conduit. For example, in Illinois and Ohio AT&T's collective bargaining agreements with certain of its unions limit the categories of personnel that can perform certain work functions in the make-ready process, and this limitation, may, in some instances, affect the time within which AT&T is able to satisfy access requests.

appeals held that the concept of nondiscrimination under the Act "merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier."[115]

Furthermore, a utility's nondiscrimination obligation under section 224(f)(1) is further constrained by the utility ability to limit access to poles and conduit where there is insufficient capacity to accommodate other prospective users or "for reasons of safety, reliability, and generally applicable engineering purposes."[116] This constraint is difficult to accommodate under, and often is ignored by, many of Fibertech's proposals. For example, Fibertech requests that the Commission require ILECs to share building-entry conduit with CLECs, even though such sharing raises important service-affecting concerns. For occupied building entry conduit, CLECs often employ rodding, which involves forcing a rigid rod to place facilities in an occupied conduct. Improper – and, indeed, even proper – rodding of occupied ducts may cause damage to existing cable facilities, either through immediate or future sheath degradation.[117] Section 224(f)(2) permits a utility conduit owner to balance the need for access to such conduit

---

[115] 120 F.3d at 812-13. Fibertech's reliance upon state commission decisions in support of its proposed prescriptive rules is misplaced. *See* Fibertech Comments at 21-24 (arguing that the Commission should "adopt a similar approach" in establishing shorter survey and make-ready time periods, citing decisions from state commissions in Connecticut, Maine, and New York). Each of these states has asserted regulatory authority over pole attachments and related facilities and thus operates under an entirely different regulatory regime than the federal statutory framework governing the Commission.

[116] 47 U.S.C. § 224(f)(2).

[117] Additionally, this aspect of Fibertech's requested relief implicates conduct by entities that are not subject to the control of utilities (nor apparently subject to the Commission's regulatory authority). Conduit from the building line to the remainder of the premises is the property of building owners, which may impose restrictions on these use of those facilities even apart from any operational requirements of the utilities using that conduit.

by prospective CLEC users with potential adverse impacts to customers – a lawful balancing process that the prescriptive measures proposed by Fibertech would effectively eliminate.

Access to poles, ducts, and conduit involve highly complex issues affecting technical and operational needs of pole and conduit owners and prospective competitive users of those facilities. As a result, bilateral negotiations are the best way to ensure that any problems are addressed through solutions that are technically feasible and consistent with public safety concerns, rather than the prescriptive rules Fibertech and its supporters endorse.

III. CONCLUSION

Consistent with the *Pole Attachment NPRM*, the Commission should establish a uniform pole attachment rate for all attachments used for broadband Internet access service to be paid by all broadband providers, should find that ILECs are entitled to the protections of "just and reasonable" pole attachment rates under section 224, and should adopt AT&T's other recommendations as outlined above.

Respectfully submitted,

By: _____

Bennett L. Ross
David C. Rybicki
WILEY REIN LLP
1776 K Street N.W.
Washington, D.C. 20006
(202) 719-7000

Gary L. Phillips
Paul K. Mancini
AT&T INC.
1120 20th Street, NW, 10th Floor
Washington, D.C. 20036

Dorian S. Denburg
AT&T INC.
675 West Peachtree Street NW
Suite 4300
Atlanta, GA 30375

Counsel for AT&T Inc.

April 22, 2008